

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 12,499

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Appeal of)

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INTRODUCTION

The petitioner appeals the decision by the Department of Social and Rehabilitation Services (SRS) "founding" a report of child sexual abuse against him, and seeks to have that report expunged from SRS records. The issue is whether there is accurate and reliable information that would lead a reasonable person to believe that the petitioner abused the child in question.

FINDINGS OF FACT

1. The petitioner is a single man who had expressed an interest in becoming a foster parent in the Fall of 1992. Towards that end, he had applied for a foster care license and was undergoing needed training. As part of his provisional approval, he was occasionally asked to provide interim or respite care for other foster care parents.
2. One of the children sent to him by SRS for foster care is the alleged victim in this case. He was at that time a fifteen-year-old boy who had been diagnosed as suffering from learning disabilities, attention deficit disorder, major depression, and psychoses. The boy was with the petitioner initially for close to three weeks while a new foster home was being found for him, from September 10 -28, 1992. He returned for respite care on two occasions, October 22-25, 1992 and November 27-29, 1992.
3. On February 18, 1993, SRS received a report from a therapist who had been working with the boy that he had accused the petitioner of molesting him while he was in his care. An interview was set up with the teenager for February 19, 1993. Present at the interview were a police officer and an SRS investigator who has a bachelor's degree in early childhood education and postgraduate credits in special education and who has worked for the Department for nine years on over 1,000 cases. The SRS investigator felt that the boy was reluctant and embarrassed at the interview, but also cooperative and forthcoming.
4. Following her interview with the boy, the investigator also interviewed other children who had been in the petitioner's foster care. Those investigations did not reveal any further allegations. The petitioner

himself was thereafter interviewed and denied the allegations, adding that he and the boy had gotten on very well and that the boy was upset that he could not be his permanent foster placement.

5. After her interviews were completed, the SRS employee concluded that the petitioner had pulled down the boy's pants and rubbed his naked genitals against the boy's buttocks on one occasion and that on another occasion he had done the same thing with their clothes on. She determined that these actions were sexually abusive and placed a finding in the registry. The petitioner, thereafter, did not pursue his foster care license, but did appeal the finding.

6. Although the SRS investigator was told conflicting stories by the only two eyewitnesses, she decided to believe the boy for the following reasons: he had made two prior complaints against other persons involving sexual abuse which the Department believed to be true; his description of the events was believable and not exaggerated; he appeared to have no motive for making these statements; and he had told persons before his last visit to the house that he did not want to go back there.

7. The SRS investigator did not believe the petitioner's denial. Her testimony made it clear that she had problems with the petitioner's credibility on a number of issues, although she did not have any evidence that he had actually ever lied to her about anything. Her assessment of his statements was largely colored by her skepticism involving his eccentric personal background.

8. The permanent foster parent was told by the boy that he did not want to return to the petitioner's home for his second respite care visit. He did not say why at that time. In February of 1993, the boy told his foster parent that the petitioner had put oil on him, showed him how to masturbate and had rubbed his erect penis against his naked buttocks. The boy appeared to his foster father to be embarrassed and nervous about relating these events and fearful of the petitioner. The foster parent believed what he said.

9. Throughout the period at issue, the boy had been treated by a psychologist who was very experienced in adolescent counseling. It was his opinion that the boy generally tells the truth although he can be defensive and untruthful when confronted about his own bad behavior. He also has difficulty recounting timeliness due to learning disabilities. In December of 1992, the boy reported that his permanent foster parent had scratched his neck but the situation was assessed and had been found to be non-abusive. On two prior occasions, the boy had also reported being sexually molested in school. There were also two reports that the boy himself had molested or improperly solicited younger children.

10. The boy had discussed the petitioner with the therapist and generally had positive things to say and had expressed an interest in returning to the petitioner's home for respite care. In February 1993, however, the boy made several statements to the therapist which prompted the reporting. The boy made essentially the same statements to the psychologist that he made to the SRS investigator. The psychologist believes the boy's statements because he gave credible details, had a markedly embarrassed and reticent affect, feared that his parents would find out about this, and had no apparent motive or gain to make from the disclosure.

11. The expert evidence established that it would be emotionally traumatic for the boy to testify at the hearing and would erase much of the therapeutic work that has been done with him. Thus, it was determined that a hardship existed for the Department to produce him personally and his testimony was allowed in the form of a written transcript of the interview with the SRS investigator and police officer on February 19, 1994. That transcript is attached hereto as Exhibit One and incorporated herein by reference.

12. On the transcription, the boy stated that during a three day visit in the Fall of 1992, and while the boy was sleeping, the naked petitioner "pulled down my pants and I didn't feel that I woke up after he was trying to rub against me." He stated further that he was rubbing against his butt with his hard penis and "making breathing noises and saying it feels good and stuff." After this incident he stated that the petitioner told him "I am going to do it to you from now on when you come here and he came back and did it again with his clothes on." He stated that two weeks later when he visited the home the petitioner came upstairs while he was changing his clothes and, with both of them clothed, "he pushed me up against the bed and then I fell off the bed in between the floor and the bookcase and he started humping up against me." He stated that the petitioner told him again that "he was going to keep doing it when I can and I told him I didn't want you to do it." He said he was glad to leave the petitioner's care and didn't want to come back. He did not claim that there had been any penetration or ejaculation.

13. The ultimate factual issue is whether the boy's statements can be considered reliable and credible from what is presented both within and outside of the transcript. It must be concluded in this instance that they cannot be categorized as reliable. The testimony of the investigator indicated that a good deal of the interview went on before the tape recorder was turned on. As a result, the transcript was an obvious recapping of a longer conversation and contained many leading questions. Very little of the information was spontaneously offered by the boy. In addition, the reports of the boy's psychological problems and prior involvement in highly sexualized behavior on at least four occasions, both as an alleged victim and as an alleged perpetrator, would suggest that a far more probing examination be done to determine the accuracy of his current statements than was attempted on the offered transcript. The fact that the investigator and therapist believe him are not persuasive in this situation. The hearing officer is required herself to assess the credibility of the boy's statements. There simply is not enough admissible evidence in this matter to determine with any accuracy whether the boy is telling the truth or not.

ORDER

SRS' decision that the report of sexual abuse of the boy by the petitioner is substantiated is reversed, and the record containing this matter is expunged from the Department's registry.

REASONS

The petitioner has made application for an order expunging the record of the alleged incident of child abuse from the SRS registry. This application is governed by 33 V.S.A. § 4916 which provides in pertinent part as follows:

(a) The commissioner of social and rehabilitation services shall maintain a registry which shall contain written records of all investigations initiated under section 4915 of this Title unless the commissioner or the commissioner's designee determines after investigation that the reported facts are unsubstantiated, in which case, after notice to the person complained about, the records shall be destroyed unless the person complained about requests within one year that it not be destroyed.

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(h) A person may, at any time, apply to the human services board for an order expunging from the registry a record concerning him or her on the grounds that it is unsubstantiated or not otherwise expunged in accordance with this section. The board shall hold a fair hearing under Section 3091 of

Title 3 on the application at which hearing the burden shall be on the commissioner to establish that the record shall not be expunged.

Pursuant to this statute, the department has the burden of establishing that a record containing a finding of child abuse should not be expunged. The Department has the burden of demonstrating by a preponderance of the evidence introduced at the hearing, not only that the report is based upon accurate and reliable information, but also that the information would lead a reasonable person to believe that a child has been abused or neglected. 33 V.S.A. § 4912(10) and Fair Hearings No. 8446, 8110 and 10,136.

"Sexual abuse" is specifically defined by 33 V.S.A. § 4912 as follows:

(8) "Sexual abuse" consists of any act by any person involving sexual molestation or exploitation of a child including but not limited to incest, prostitution, rape, sodomy, or any lewd and lascivious conduct involving a child. Sexual abuse also includes the aiding, abetting, counseling, hiring, or procuring of a child to perform or participate in any photograph, motion picture, exhibition, show, representation, or other presentation which, in whole or in part, depicts a sexual conduct, sexual excitement or sadomasochistic abuse involving a child.

If the boy's allegations here are true, it was entirely reasonable for the Department to believe that he had been sexually abused by the petitioner. The Department's investigator and the child's therapist believe that they boy's reports are accurate and reliable. That may very well be the case. However, those witnesses had the advantage of talking with the boy; the finder of fact in this de novo hearing did not. In lieu of that testimony, the Department submitted a transcript of part of its interview with the boy. That transcript was submitted under Fair Hearing Rule 14 because of the hardship to the Department of producing the testimony of a child victim. The Board has accepted that kind of evidence in the past but the weight given to that evidence depends totally upon its quality, the evaluation of which must be made on a case by case basis. See Fair Hearing 10,136

The quality of the substituted evidence in this case was poor. The interview was leading and incomplete. It could not in fairness be used to determine the accuracy or reliability of the statements made by the boy. It must be concluded that the Department failed to meet its burden of proving that its information was accurate and reliable. Therefore, the petitioner is entitled to expungement of the record.

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